82-983

NO. _____



IN THE

# Supreme Court Of The United States

October Term, 1982

JAMES E. DUNCAN ..... APPELLANT

VS.

HAROLD PECK ..... APPELLEE

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF OHIO

## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED - 1(a)

1. Whether Ohio's attachment statute, Ohio Revised Code §2715, which provides for the prejudgment attachment of the property of a nonresident defendant which is present in Ohio without providing for (1) the posting of bond by the Plaintiff; (2) the filing of an affidavit by the Plaintiff alleging personal knowledge of specific facts which form a basis for the prejudgment seizure; (3) judicial supervision of the attachment process; (4) dissolution of the attachment upon the posting of security by the defendant, or (5) an immediate right of hearing to the defendant in which the Plaintiff must prove that the seizure is warranted, is consistent with the due process requirements of the 14th Amendment to the United States Constitution;

2. Whether Service of Process by publication pursuant to 2703.14(G) and Ohio Civil Rule 4.4(A), in a Cincinnati, Ohio newspaper is notice reasonably calculated to reach an out of state defendant in Lexington, Fayette County, Kentucky;

3. Whether the decisions of the United States Supreme Court, interpreting the Constitution of the United States are binding on the state courts of Ohio under Article VI of the United States Constitution;

4. Whether the presence of a stock certificate in Cincinnati, Ohio which is owned by a resident of Lexington, Kentucky, who has no other contacts, ties or

**relations with Ohio constitutes sufficient minimum contacts with Ohio, consistent with the 14th Amendment due process clause, to support the exercise of personal jurisdiction by the Ohio State courts over the nonresident owner's stock certificate.**

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## OPINIONS BELOW - 1(d)

The opinion of the Supreme Court of Ohio from which this appeal is taken, is attached hereto, and printed in full as Appendix A, hereto.

The unreported opinion of the First Appellate District of Ohio for Cincinnati, Hamilton County, Ohio, No. C-810418, rendered the 7th day of April, 1982, is reprinted as Appendix B, hereto.

## JURISDICTION - 1(e)

This action involves an Ohio Plaintiff-Appellee invoking a pre-judgment attachment statute, Ohio Revised Code 2715 and service by publication, pursuant to Ohio Revised Code 2703.14(G) and Ohio Civil Rule 4.4(A), on a nonresident-Appellant (Lexington, Fayette County, Kentucky).

On September 15, 1982, the Supreme Court of Ohio dismissed the Appellant's appeal on the ground that it involved no substantial constitutional question. Notice of Appeal was filed with the Clerk of the Ohio Supreme Court on November 24, 1982.

The date of the judgment or decree sought to be reviewed and the time of its entry is September 15, 1982.

The date of the Order by the Ohio Supreme Court denying Appellant's Petition for Review was entered September 15, 1982.

Notice of Appeal to this Court was filed on November 24, 1982, in the Supreme Court of Ohio. (Appendix C)

Since the constitutionality of Ohio Revised Code 2715 and 2703.14(G) and Ohio Civil Rule 4.4(A) are in question and 28 U.S.C. §2403(b) may be applicable, the Ohio Attorney General has been served with notice of the appeal.

The statutory provision believed to confer on this Court jurisdiction of the appeal is 28 U.S.C. §1257(2), which permits this Court to review, by appeal, the judgment of the highest Court of a state "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity."

Among the cases believed to sustain jurisdiction are *Sniadach* v. *Family Finance*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Mitchell* v. *W. T. Grant*, 416 U.S. 600 (1974); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Pennoyer* v. *Neff*, 95 U.S. 714 (1877); *McDonald* v. *Mabee*, 243 U.S. 90 (1977); *Mullane* v. *Central Hanover Bank & Trust*, 339 U.S. 306 (1950); *Shaffer* v. *Heitner*, 433 U.S. 186 (1977); *International Shoe* v. *Washington*, 326 U.S. 310 (1945); *Marbury* v. *Madison*, 1 Cranch 37, (1803); *Cooper* v. *Aaron*, 358 U.S. (1958).

## CONSTITUTIONAL, STATUTORY AND CIVIL RULE PROVISION - 1(f)

Article VI of the Constitution of the United States provides, in relevant part:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any states to the contrary notwithstanding."

Section I of the Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> "... nor shall any state deprive any person of life, liberty, or property, without due process of law; ..."

Ohio Revised Code 2715.01 provides, in relevant part:

> "In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant upon any one of the following grounds:
>
> (B) That the defendant is not a resident of this state; ..."

Ohio Revised Code 2715.03 provides that:

"An order of attachment shall be made by the clerk of the court in which the action is brought, in any case mentioned in section 2715.01 of the Revised Code, where there is filed in his office an affidavit of the plaintiff, his agent, or attorney, showing:
(A) The nature of the plaintiff's claim;
(B) that it is just;
(C) The amount which the Affiant believes the plaintiff ought to recover;
(D) The existence of any one of the grounds for an attachment enumerated in such section.

Such affidavit may be made before any person authorized to administer oaths whether an attorney in the case or not."

Ohio Revised Code 2715.04 provides, in relevant part:

"When the ground of attachment is that the defendant is a foreign corporation, or not a resident of this state, the order of attachment may be issued without a bond. . ."

Ohio Revised Code 2703.14(G) is as follows:

Ohio Revised Code 2703.14 provides, in relevant part, that:

"Service may be made by publication in any of the following cases:

(G) In an action in which it is sought by a provisional remedy to take or to appropriate in any way property of the defendant, when the defendant is not a resident of this state or is a foreign corporation or his place of residence cannot be ascertained; . . .

Ohio Civil Rule 4.4(A) provides:

**RULE 4.4 Process: service by publication**

**(A) Residence unknown.** When the residence of a defendant is unknown, service shall be made by publication in actions where such service is authorized by law. Before service by publication can be made, an affidavit of a party or his counsel must be filed with the court. The affidavit shall aver that service of summons cannot be made because the residence of the defendant is unknown to the affiant and cannot with reasonable diligence be ascertained.

Upon the filing of the affidavit the clerk shall • *cause* service of notice • to be made by publication in a newspaper of general circulation in the county in which the complaint is filed. If no newspaper is published in that county, then publication shall be in a newspaper published in an adjoining county. The publication • shall contain *the name and address of the court, the case number, the name of the first party on each side, and the name and last known address, if any, of the person or persons whose residence is unknown. The publication shall also contain* a summary statement of the object of the complaint and demand for relief • *and* shall notify the person to be served that he is required to answer

within twenty-eight days after the last publication •. *The publication* shall be published at least once a week for six successive weeks *unless publication for a lesser number of weeks is specifically provided by law.* Service shall be complete at the date of the last publication.

After the last publication, the publisher or his agent shall file with the court an affidavit showing the fact of publication together with a copy of the notice of publication. The affidavit and copy of the notice shall constitute proof of service.

## STATEMENT OF THE CASE - 1(g)

On October 25, 1978, Harold Peck, a resident of Cincinnati, Hamilton County, Ohio filed suit in Common Pleas Court, A-7809432, against James E. Duncan, a Lexington, Kentucky resident; Ed Gray, a Georgetown, Kentucky resident; and Duncan-Gray Mining Co., Inc., a Kentucky Corporation. (Appendices D and D-1). The basis of the suit was an alleged oral contract executed with James E. Duncan, Ed Gray and Duncan-Gray Mining Co., Inc. in 1975. Harold Peck in the aforementioned action sought a joint and/or several judgment against James E. Duncan, Ed Gray and Duncan-Gray Mining Co., for $20,000.00 On November 1, 1978, 11,401 shares of stock in Highlands Coal and Chemical Corporation, owned by James E. Duncan, but physically present at the Executive Offices of Highlands Coal and Chemical Corporation, in Cincinnati, Ohio, were seized by an at-

tachment order issued by the Clerk of Courts and executed by the Sheriff of Hamilton County. The attachment order was issued ex parte pursuant to Ohio Revised Code 2715. Service of Process, by certified mail, was sent to James E. Duncan, 1025 Dove Run Road, Lexington, Kentucky 40502; Ed Gray RR #2, Lexington, Kentucky 40505; and Duncan-Gray Mining Co., Inc., 2nd Floor Citizens Plaza Building, Louisville, Kentucky 40202. All of the certified mail was returned. James E. Duncan's was returned as "undeliverable as addressed, no forwarding order on file"; Ed Gray's was returned as "unclaimed"; Duncan-Gray Mining Co., Inc.'s was returned as "not at this address".

An Affidavit for Service by Publication was executed by attorney Robert A. Pitcairn, Jr., pursuant to Ohio Revised Code 2703.14(G) and Ohio Civil Rule 4.4(A). (Appendix D-3) Service in the Cincinnati Court Index was commenced on January 24, 1979. On May 29, 1979 a joint and/or several judgment for $20,000.00 was entered against all three defendants. (Appendices D-4, D-5 and D-6, respectively). Pursuant to an execution, levy and sheriff's sale, James E. Duncan's stock was sold on or about September 10, 1979 to Harold Peck for $15,201.34. Execution Number EX-85687.

On October 12, 1979 the 11,401 shares of James E. Duncan's stock was transferred into the name of Harold Peck. The stock in January of 1981 had a value

between $190,000.00 to $200,000.00 or $17.00 per share.

On July 3, 1980, the Appellant made a motion in the Ohio Court of Common Pleas, pursuant to Ohio Civil Rule 60(b)(5), to set aside the default judgment that had been entered against him on May 29, 1979. The motion to set aside the default judgment was made on the grounds that:

(1) Service of process on a nonresident defendant by publication was ineffective;

(2) The Ohio Court of Common Pleas lacked personal jurisdiction over the defendant; and

(3) The default judgment was void because service of process was ineffective and the court lacked personal jurisdiction over the defendant.

On or about February 18, 1981 the Default Judgment against Duncan-Gray Mining Co. was set aside by agreement and it was dismissed from the state court action. (Appendix E-1)

On or about March 26, 1981 the Default Judgment against Ed Gray was set aside by agreement. (Appendix E)

On May 5, 1981, Judge Paul George of the Court of Common Pleas held a hearing on Appellant's motion to set aside the Default Judgment. At that hearing, the Appellant contended that:

(1) The Default Judgment should be set aside on the ground that the Court lacked the necessary personal jurisdiction over the defendant;

(2) Ohio's attachment statute, Ohio Revised Code 2715, violated the due process requirements of both the United States and Ohio Constitution; and

(3) Service of Process on a resident of Kentucky by publication, Ohio Revised Code 2703.14(G) and Civil Rule 4.4(A), in Ohio was insufficient notice.

At the conclusion of the hearing, Judge George ordered that the Default Judgment be set aside.

Thereafter, the Appellee perfected a timely appeal to the Ohio Court of Appeals, First Appellate District of Ohio. In his brief to the Court of Appeals, Appellee contended that the Default Judgment against the Appellant which had been set aside by Judge George should be reinstated because no factual evidence as to the Appellant's defenses to the claim asserted against him had been presented at the hearing before Judge George.

In his brief to the Ohio Court of Appeals, the Appellant contended that:

1. Ohio Revised Code 2715 did not meet the constitutional standards required by the United States Supreme Court;

2. Ohio Revised Code 2715 had been held, by the Ohio Supreme Court, to be violative of both the United States and Ohio Constitutions;

3. Service of Process by publication in a local newspaper, pursuant to Ohio Revised Code 2703.14(G) and Ohio Civil Rule 4.4(A), on a Kentucky resident, was inadequate;

4. The Ohio Court of Common Pleas lacked jurisdiction; and

5. The trial court did not abuse its discretion in setting aside a void ab initio judgment.

On April 7, 1982, the Ohio Court of Appeals, First Appellate District, entered an Order reversing the Ohio Court of Common Pleas and reinstating the Default Judgment against the Appellant on the ground that the Appellant had failed to introduce any evidence at the hearing on the Motion to set aside the Default Judgment and that he had no meritorious defense or claim to present if the Judgment was set aside.[1]

On March 6, 1982, the Appellant filed a Notice of Appeal to the Ohio Supreme Court. The Appellant contended in his brief to the Ohio Supreme Court that:

1. When a trial court, in the exercise of its discretion, grants a hearing on a motion to set aside a Default Judgment pursuant to Ohio Civil Rule

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[1]The Court of Appeals, First Appellate District, in its opinion, did not comment on the constitutional arguments presented by James E. Duncan when it reinstated the judgment. (Appendix B)

60(b)(5), the Court may consider the entire record of the case, including pleadings, affidavits and all other accompanying materials and apply the applicable law in reaching a decision on the issue of whether a meritorious defense has been made and it is not necessary for the movant to offer testimony or other evidence to substantiate the existence of the meritorious defense when such defense becomes readily apparent from a review of the record of the case and application of the existing law; and

2. A court cannot acquire jurisdiction over the property or the person of a defendant on the basis of service of process by publication, when the service by publication is made in conjunction with a constitutionally defective attachment statute.

On September 15, 1982, the Ohio Supreme Court dismissed the Appellant's Appeal on its own Motion on the ground that it contained no significant constitutional question. On November 24, 1982, the Appellant filed a Notice of Appeal to the Supreme Court of the United States with the Ohio Supreme Court.

## REASONS THE QUESTIONS PRESENTED BY THIS APPEAL ARE SUBSTANTIAL - 1(h)

The questions presented by this Appeal are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution because the Court has previously considered and passed on each question presented. In fact, the law on each issue raised by this Appeal is well-settled by prior decisions of this Court.

## ARGUMENT I

**WHETHER AN ATTACHMENT STATUTE, OHIO REVISED CODE 2715 WHICH DID NOT PROVIDE FOR A PRESEIZURE OR POST SEIZURE HEARING, NOR THE POSTING OF AN ATTACHMENT BOND OR REQUIRE THE PLAINTIFF TO ESTABLISH A CONVINCING SHOWING OF A NEED FOR THE ATTACHMENT, VIOLATES THE 14th AMENDMENT DUE PROCESS CLAUSE TO THE UNITED STATES CONSTITUTION.**

**WHETHER DECISIONS OF THE UNITED STATES SUPREME COURT ARE BINDING ON THE STATES THROUGH THE SUPREMACY CLAUSE, ARTICLE VI OF THE UNITED STATES CONSTITUTION.**

The Appellee herein utilized Revised Code # 2715 in October of 1978 to attach the Appellant's stock prior to judgment. Service of Process was effectuated by publication. However, the Supreme Court of Ohio in July, 1980 declared O.R.C. 2715 unconstitutional in *Peebles* v. *Clement*, 408 N.E. 2nd 689 (1980). The Ohio Supreme Court adopted the constitutional standards enunciated by the United States Supreme Court in

*North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell* v. *W. T. Grant*, 416 U.S. 600 (1974); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); and *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

The *Mitchell, Fuentes, Sniadach* and *North Georgia Finishing* cases were decided between 1969 and 1975, thereby theoretically, striking Ohio Revised Code Chapter 2715 at that time, because decisions of the United States Supreme Court are binding on all of the states when decided. Constitution of the United States, Article VI; *Marbury* v. *Madison*, 1 Cranch 37, 2 L.Ed. 60 (1803); *Cooper* v. *Aaron*, 358 U.S. 1, (1958).

The attachment which led to the *Peebles, supra* decision occurred on February 25, 1977. The attachment at issue in the instant controversy occurred on November 1, 1978. In *Peebles, supra*, at 317, the Ohio Supreme Court wrote: "however, if the attachment was constitutionally invalid at the time it was made because appellees were not afforded sufficient procedural safeguards, it is equally invalid one year later and can be dismissed by a court at that time."

Through this language the Court had said that the *Peebles* attachment was constitutionally invalid when made on February 5, 1977. It follows that the attachment in the instant case was constitutionally invalid when made on November 1, 1978. A statute declared unconstitutional is void from the date of enactment. *Hogg* v. *Zanesville Canal and Manufactur-*

*ing Co.*, 5 Ohio 410 (1832). It is a mere nullity. *Cincinnati, Wilmington and Zanesville Railroad Co.* v. *Clinton County*, 1 Ohio St. 77 (1852).

The procedural safeguards afforded a defendant in a prejudgment attachment are the following, as explained by the United States Supreme Court in *Mitchell* and *Fuentes:*

> (1) The replevin order must be granted by a judge, rather than a clerk.
>
> (2) The applicant must make a convincing showing of need for prejudgment seizure, rather than merely state that it was necessary. Therefore a verified affidavit must be made with the grounds for attachment.
>
> (3) There must either be an immediate pre-seizure or at the least post-seizure hearing on the attachment and the posting of a bond.
>
> (4) There is need for documentary proof, rather than merely just a "fault" standard.

Since O.R.C. 2715 did not require the aforementioned constitutional safeguards, the Ohio Supreme Court adopted the standards at its first chance in *Peebles* v. *Clements, supra.* Thus the attachment procedures utilized by the Appellee were in violation of the Appellant's Fourteenth Amendment Due Process guarantees and the Ohio Constitution due process guarantees.

Ohio Revised Code 2715 did not meet the constitutional standards as set forth by the United States Supreme Court cases or in *Peebles.* In the Cincinnati action against James E. Duncan, a prejudgment seizure bond *was not posted* and the attachment was issued by a *clerk.* Both the United States Supreme Court and the Ohio Supreme Court stated unequivocably that *judicial supervision* of prejudgment seizures is a mandatory requirement for such action. In addition, the attachment against Duncan was issued *ex parte* and Duncan had no opportunity for a post seizure hearing to dissolve the attachment because his mail was returned as "undeliverable as addressed, no forwarding order on file."

In *Lincoln Tavern, Inc.* v. *Snader,* 133 N.E. 2nd 606 (1956) the Ohio Supreme Court stated that strict compliance with the attachment statute was required for the entry of a valid judgment; if the attachment statute was not strictly followed then the judgment was void ab initio rather than merely voidable.

In *Lincoln, supra,* the Ohio Court allowed recovery against a third party at the judicial sale. The Court reasoned that if the attachment statute was not strictly followed then the judgment execution and sheriff sale were both void.

It is obvious that O.R.C. 2715 was constitutionally defective under the constitutional standards set forth in *Sniadach, Fuentes, Mitchell* and *Di-Chem, supra,* and the judgment entry, execution and sheriff sale were also void ab initio.

## ARGUMENT II

**WHETHER SERVICE OF PROCESS BY PUBLICATION, ON A NONRESIDENT DEFENDANT, PURSUANT TO OHIO REVISED CODE 2703.14(G) and OHIO CIVIL RULE 4.4(A), IS NOTICE REASONABLY CALCULATED TO REACH A NONRESIDENT DEFENDANT, AS REQUIRED BY THE 14TH AMENDMENT DUE PROCESS CLAUSE TO THE UNITED STATES CONSTITUTION.**

It has long been established that constructive service on a nonresident by publication furnishes no legal basis for a judgment in personam. *Pennoyer* v. *Neff*, 95 US 714, (1877), *Oil Well Supply Co.* v. *Koen*, 60 NE 603 (1901).

The Court stated in *Pennoyer, supra*, as follows:

> "If, without personal service, judgments in personam, obtained ex parte against nonresidents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would thus be obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished."

James E. Duncan was a real estate owner in Lexington, Fayette County, Kentucky, at 1235 Roseberg Court, and had been a homeowner since March, 1976.

There has been no proof that there was any attempt to personally serve James E. Duncan. Peck and Pitcairn continually sent mail to an incorrect business address without "Suite Number 109" on the envelope, but never attempted to serve Duncan at his home at 1235 Roseberg Court. The law was never intended to be used in this manner.

The United States Supreme Court has also held that a personal judgment based on service by publication is absolutely void, even though the defendant is technically domiciled within the state, if he is absent therefrom without the intention of returning. *McDonald* v. *Mabee*, 243 US 90, (1917). The Supreme Court of the United States addresses the notice problems by basically saying "tell 'em like you want 'em to know". In the landmark decision of *Mullane* v. *Central Hanover Bank & Trust*, 339 US 306 (1950), the Supreme Court said, as to notice for those whose addresses are known or are reasonably ascertainable:

> "An essential and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection . . . process which is a mere gesture is not due process."

The last phrase of the above is so aptly put — "process which is a mere gesture is not due process." Certainly that would apply to James E. Duncan. Peck

and Pitcairn's mere gesture of sending a summons to an address with the knowledge that the mail would be returned as undeliverable and consequently subject Duncan to service by publication was a "mere gesture".

The Supreme Court's language in *Mullane* would apply regardless of whether the proceeding was classified as quasi-in-rem or as in personam. In line with this is *Oil Well Supply* v. *Koen, supra,* which states that "service by publication in an action *in personam* against a nonresident of the state is utterly void and personal judgment against the non-resident based on service by publication is invalid".

In addition, as to whether or not the Court had personal jurisdiction, 32 Ohio Jur 2d Judgments 47, the Ohio Courts have said:

> "A judgment cannot be lawfully rendered in a proceeding in which the court has no jurisdiction because of lack of due notice to a person to whom such notice is required by statute to be given, and so vitally important is the requirement of due notice to the defendant that all proceedings of courts without it, in passing on the merits of the case, are held to be not merely erroneous, but absolutely *void.*" (Emphasis added).

A void judgment is defined in 32 Ohio Jur 2d Judgments 48 as "a mere nullity which is not respected as the act of a court . . . the judgment has no legal or binding force or efficacy." Further, a void

judgment "may be attached and impeached either directly or collaterally." The Appellant was not given notice and discovered later that his stock had been attached and sold to cover a Twenty Thousand and 00/100 ($20,000.00) Dollar personal default judgment. Again, 32 Ohio Jur 2d 48 states that:

> ". . . [F]ull faith and credit clause of the Constitution does not sanction or comprehend a personal judgment against a nonresident based upon service by publication or constructive service."

Utilizing the concept of "void judgment", *The Lincoln Tavern, supra* stated that it is a nullity and that "any proceedings taken thereunder should be vacated and held for naught". The attached property, as in the case at bar, must be returned:

> "Since the sale of the defendant's property was based on the judgment and the judgment is void on the face of the record, the sale made thereunder is also void."

## ARGUMENT III

**WHETHER THE PHYSICAL PRESENCE OF A STOCK CERTIFICATE, WITHOUT OTHER CONTACTS, TIES OR RELATIONS WITH THE FORUM, IS SUFFICIENT TO ESTABLISH JURISDICTION CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

The suit in Cincinnati against James E. Duncan by the Appellee herein was a personal action based on an *alleged oral contract* claim for the sum of Twenty Thousand and 00/100 ($20,000.00) Dollars. The standards enunciated in *Mitchell, Fuentes, Sniadach* and *North Georgia Finishing,* are the constitutional standards for quasi-in-rem proceedings where the argument is between two named parties for a "*thing*". The Appellee herein, Harold Peck, has never had a *proprietary interest* in Mr. Duncan's stock. The suit in Cincinnati involved a finder's fee for arranging financing. Since this was a personal jurisdiction-type of action, the Appellee utilized quasi-in-rem jurisdiction to hold "hostage" the property of the Appellant which gave him an ultimatum to either fight or lose the property in a jurisdiction in which "minimum contacts" were lacking. In 1977, the United States Supreme Court denied the use of such jurisdiction to coerce *in personam* appearances, *when the claim was unrelated to the rights of the parties in the property.* Since Peck's claim was for *money* in a *personal* action, the use of an attachment against personal property unrelated to the cause of action, as the basis of

jurisdiction, was a violation of the Fourteenth Amendment Due Process Clause.

The two cases denying this use of *quasi-in-rem* jurisdiction are *Shaffer* v. *Heitner*, 433 U.S. 186 (1977) and *U.S. Industries* v. *Gregg*, 540 F.2d 142 (3d Cir. 1976). *Shaffer* was a stockholder's derivative suit where none of the Defendants had "minimum contacts" with the Delaware forum, while *Gregg* was a suit by a Delaware corporation against a Florida resident who had no "minimum contacts" with the forum either. The Supreme Court held that a state cannot attempt to coerce an *in personam* appearance by the seizure of valuable assets, such as stock in the case at bar, where the assets are unrelated to the cause of action.

Now, all jurisdictional exercises must meet the *International Shoe* v. *Washington*, 326 U.S. 310 (1945), test of "minimum contacts". In *World-Wide Volkswagen* v. *Woodsen*, 444 U.S. 286 (1980), the Supreme Court said that the Due Process Clause does not "contemplate that a state may make a binding judgment in personam against an individual and/or corporate defendant with which the state has no contact, ties or relations". The Appellant herein had only a stock certificate in Cincinnati, and that certificate was unrelated to Peck's money claim of Twenty Thousand and 00/100 ($20,000.00) Dollars. Appellant had no other contact with the Ohio forum, thereby rendering the judgment void.

Additionally, in *Kulko* v. *Superior Court of Los Angeles*, 436 U.S. 84 (1978), the Supreme Court has added to the "minimum contacts" requirement the test of "purposeful availment". The *presence of a stock certificate* does not meet the test of "purposeful availment".

Therefore, the Appellant contends that the Judgment was void because of lack of jurisdiction, since his only contact with the Appellee and the Ohio forum was the location of his stock certificates in a vault in Cincinnati, which is not enough to constitutionally allow jurisdiction, under the Fourteenth Amendment Due Process Clause.

John Robinson's Affidavit (Paragraph 4) states that Harold Peck had nothing to do with the formation of Duncan-Gray Mining Co., Inc. This supports the absolute denials by Duncan and Gray. More significant is that Harold Peck never had a *proprietary interest* in Duncan's stock. Peck has never established a creditor-debtor relationship with any of the original defendants.

The only contact with the Cincinnati forum was Duncan's stock certificate which is not sufficient to support personal or quasi-in-rem jurisdiction. In support of the aforementioned contention of no contacts with the Cincinnati forum is an examination of the original Complaint filed October 25, 1978. That Complaint does not reflect any contact, tie or relation with Cincinnati, Hamilton County, Ohio. (Appendix D-1)

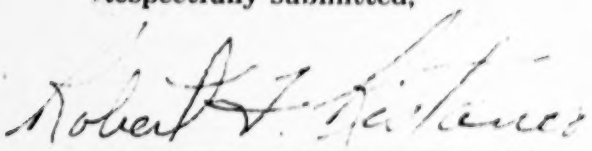
Assuming that Ohio is one of the fifty states in our federal system of government, the overriding issue presented by this case is whether the Constitution of the United States, as interpreted by decisions of the United States Supreme Court, is the supreme law of the land and binding upon the judges in every state, as plainly set forth in Article VI, Section 2 of the Constitution of the United States. Refusal by the Court to consider this case would have monumental ramifications in that, as a practical matter, such refusal would be signal to the state courts that they are free to ignore the United States Constitution if they so choose. Such a turn of events would seriously undermine and violate Article VI, Section 2 of the Constitution of the United States.

If such a situation were to arise, Article VI would be meaningless and the decisions of this Court would, as a practical matter, be advisory only. In essence, refusal to consider this matter could result in the demise of our federal government with each state free to, among other things, interfere with interstate commerce to any degree and in any manner and to limit or abolish such basic constitutional guarantees as equal protection and due process of law.

For the reasons set out hereinabove, it is herein submitted that Ohio Revised Code 2715 and 2703.14(G) and Civil Rule 4.4(A) are denials of due process of law as guaranteed by the 14th Amendment to the United States Constitution, and this Court, it is

respectfully requested, ought to note probable jurisdiction.

Respectfully submitted,



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